SUPREME COURT, U.S.
FILED
JUN 7 - 2004
OFFICE OF THE CLERK

No. 03-407

IN THE

Supreme Court of the United States

JOHN F. KOWALSKI, JUDGE, 26TH JUDICIAL CIRCUIT COURT OF MICHIGAN, ET AL.,
Petitioners,

v.

JOHN C. TESMER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

DENNIS W. ARCHER
Counsel of Record
SETH P. WAXMAN
PAUL R.Q. WOLFSON
NOAH A. LEVINE
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60610
(312) 988-5000

QUESTION PRESENTED

Under Michigan law, a defendant who has been convicted of a criminal offense after pleading guilty and who wishes to appeal from his conviction or sentence must obtain leave of court to appeal. Mich. Const. art. I, § 20. Michigan law broadly restricts, and in many cases prohibits, the appointment of counsel for indigent defendants applying for leave to appeal. If leave to appeal is granted, then counsel will be appointed for an indigent appellant. Mich. Comp. Laws § 770.3a.

In this brief, the American Bar Association addresses the following question:

Whether Michigan's restrictions on appointment of appellate counsel for indigent criminal defendants who have pleaded guilty and who, under state law, must apply for leave to appeal from a conviction or sentence comport with the requirements of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE .....

SUMMARY OF ARGUMENT .....

ARGUMENT .....

ANY INDIGENT CRIMINAL DEFENDANT WHO SEEKS TO PURSUE A FIRST APPEAL SHOULD HAVE APPOINTED COUNSEL, EVEN IF THAT DEFENDANT HAS PLEADED GUILTY AND MUST OBTAIN LEAVE TO APPEAL .....

A. Without The Assistance Of Counsel, An Indigent Defendant Who Wishes To Pursue A First Appeal Will Be Seriously Disadvantaged .....

B. There Is No Basis For Denying Assistance Of Counsel To Indigent Defendants Seeking Leave To Appeal Convictions Based On Guilty Pleas .....

C. Michigan's Interests In Discouraging Meritless Appeals And Reducing Appellate Backlog Are Insufficient To Sustain The Challenged Statute .....

CONCLUSION .....

TABLE OF AUTHORITIES

CASES

Page(s)

Alabama v. *Smith*, 490 U.S. 794 (1989) 9
Anders v. *California*, 386 U.S. 738 (1967) 22
Anderson v. *Harless*, 459 U.S. 4 (1982) 11, 16
Baldwin v. *Reese*, 124 S. Ct. 1347 (2004) 11
Booth Newspapers v. *University of Michigan Boarde of Regents*, 507 N.W.2d 422 (Mich. 1993) 13
Bousley v. *United States*, 523 U.S. 614 (1998) 9, 10, 18
Boykin v. *Alabama*, 395 U.S. 238 (1969) 11
Douglas v. *California*, 372 U.S. 353 (1963) 12, 14, 21
Estelle v. *Williams*, 425 U.S. 501 (1976) 3
Evitts v. *Lucey*, 469 U.S. 387 (1985) 8, 10
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 7, 8
Gray v. *Netherland*, 518 U.S. 152 (1996) 11
Henderson v. *Morgan*, 426 U.S. 637 (1976) 10, 11
Holland v. *Illinois*, 493 U.S. 474 (1990) 11
Illinois v. *Gates*, 462 U.S. 213 (1983) 13
In re Guilty Plea Cases, 235 N.W.2d 132 (Mich. 1975) 15
Jones v. *Barnes*, 463 U.S. 745 (1983) 14, 22
McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 3
McMann v. *Richardson*, 397 U.S. 759 (1970) 15
People v. *Babcock*, 666 N.W.2d 231 (Mich. 2003) 19
People v. *Conway*, No. 246026, 2004 WL 787179 (Mich. Ct. App. Apr. 13, 2004) 16
People v. *Cook*, No. 245018, 2004 WL 576251 (Mich. Ct. App. Mar. 23, 2004) 20
People v. *Dupuis*, Nos. 239315, 239316, 2003 WL 22956389 (Mich. Ct. App. Dec. 16, 2003) 17
People v. *Duty*, No. 241759, 2003 WL 22871279 (Mich. Ct. App. Dec. 4, 2003) 17
People v. *Hedgwood*, 636 N.W.2d 127 (Mich. 2001) 15
People v. *Ingram*, 484 N.W.2d 241 (Mich. 1992) 18

TABLE OF AUTHORITIES—Continued

Page(s)

People v. *Kimble*, 651 N.W.2d 798 (Mich. Ct. App. 2002), *leave to appeal granted*, 659 N.W.2d 231 (Mich. 2003) 16
People v. *Miller*, 604 N.W.2d 781 (Mich. Ct. App. 1999) 9
People v. *Miller*, No. 240613, 2003 WL 22442992 (Mich. Ct. App. Oct. 28, 2003) 15, 17, 20
People v. *Reed*, 499 N.W.2d 441 (Mich. Ct. App. 1993) 9
People v. *Rostick*, No. 241916, 2004 WL 67551 (Mich. Ct. App. Jan. 15, 2004) 15
People v. *Scott*, No. 243418, 2004 WL 405919 (Mich. Ct. App. Mar. 4, 2004) 16
People v. *Ward*, 594 N.W.2d 47 (Mich. 1999) 18
People v. *Wilson*, 652 N.W.2d 488 (Mich. Ct. App. 2002) 17
Powell v. *Alabama*, 287 U.S. 45 (1932) 7
Powers v. *Ohio*, 499 U.S. 400 (1991) 11
Ross v. *Moffitt*, 417 U.S. 600 (1974) 12, 14, 15
Smith v. *Robbins*, 528 U.S. 259 (2000) 22
Tollett v. *Henderson*, 411 U.S. 258 (1973) 15
United States v. *Ash*, 413 U.S. 300 (1973) 8
United States v. *Timmreck*, 441 U.S. 780 (1979) 18
Wiggins v. *Smith*, 123 S. Ct. 2527 (2003) 2

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Mich. Const. art. I, § 20 i
Mich. Comp. Laws § 769.34(2) 19
Mich. Comp. Laws § 770.3a ..... i, 16
Mich. Comp. Laws § 777.21(1) 19
Mich. Comp. Laws § 777.31 19
Mich. Comp. Laws § 777.51 19
Mich. Comp. Laws § 777.61-777.69 19
MCR 6.429(C) 17
MCR 6.508(D)(3) 9

TABLE OF AUTHORITIES—Continued

Page(s)

MCR 7.205 9
MCR 7.216 22
MCR 7.302(B) 14
Sup. Ct. R. 10 14

MISCELLANEOUS

American Bar Association, *Model Rules of Professional Conduct* 22
American Bar Association, *Standards for Criminal Justice* (2d ed. 1980, Supp. 1986) 2, 3, 4, 22, 23
Burger, Warren E., *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974) 2
International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14, 999 U.N.T.S. 171 4

In the Supreme Court of the United States

No. 03-407

JOHN F. KOWALSKI, JUDGE, 26TH JUDICIAL CIRCUIT COURT OF MICHIGAN, ET AL.,
Petitioners,

v.

JOHN C. TESMER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE AMICUS CURIAE[1]

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession, dedicated to the promotion of a fair system of justice. The

[1] Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

ABA has more than 400,000 members, including prosecutors, public defenders, private attorneys, state and federal trial and appellate judges, legislators, law professors, law enforcement and corrections personnel, law students, and nonlawyer "associates" in allied fields. Since its inception, the ABA has actively promoted improving the administration of justice and increasing the availability and quality of legal counseling to those who need it. In particular, ensuring that all indigent criminal defendants have appointed counsel has been a cornerstone of the ABA's mission, as reflected in its Goal II: "To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition."

The ABA respectfully submits this brief as amicus curiae because this case implicates matters addressed by the Standards for Criminal Justice promulgated by the ABA. *See generally* American Bar Association, *Standards for Criminal Justice* (2d ed. 1980, Supp. 1986) (Standards). The Standards have been developed, refined, and approved over more than thirty years by task forces of the ABA made up of prosecutors, judges, defense lawyers, academics, and others, as well as by the wider and diverse membership of the ABA. Although the Standards do not purport to set forth the ABA's views on the requirements of the Constitution, they do represent the consensus of an experienced group of prosecutors, defense attorneys, and judges on procedures for a "criminal justice system that is fair, balanced, and constitutionally responsive to the needs of today and the future."[2] The Standards have been widely cited, including by this Court, as a guide to criminal justice administration.[3]

---

[2] 1 Standards xx; *see also* Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251-252 (1974) ("The Standards are a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual.").

[3] On several occasions, this Court has found the Standards helpful in ascertaining the proper balance of individual rights and societal interests in the criminal justice system. *See, e.g., Wiggins* v. *Smith*, 123 S. Ct. 2527, 2535-2536 (2003); *McKaskle* v. *Wiggins*, 465 U.S. 168, 179 (1984); *Estelle* v. *Williams*, 425 U.S. 501, 504 (1976).

Several of the Standards speak directly to the issue in this case and support the position that all criminal defendants should have counsel on appeal. Most directly, Standard 21-3.2(a), entitled "Counsel on appeal," states:

> At the first level of appeal, every convicted defendant, appellant or appellee, should have assistance of counsel. For persons without means to obtain adequate legal representation, counsel should be assigned unless the right to counsel is explicitly waived. Assigned counsel should be compensated from public funds.

4 Standards at 21.39. The Standards also take the position that denial of appointed counsel on first appeals by indigent defendants represents an unsound deterrent to potentially meritorious appeals. Standard 21-2.3(a), entitled "Unacceptable inducements and deterrents to taking appeals," explains that a system of elective appeals "presupposes that the parties with the right to appeal will choose to do so only when they, with advice of counsel, have identified grounds on which substantial argument can be made for favorable action by the appellate court. The system should not contain factors that induce or deter appeals for other reasons." 4 Standards at 21.25. Standard 21-2.3(c) gives, as a specific example of an unacceptable deterrent to defendants' appeals, "denial of necessary legal assistance and related services at public expense to appellants who cannot afford adequate legal representation." 4 Standards at 21.26.

More generally, the ABA opposes restrictions on the ability of convicted criminal defendants to pursue a first appeal of right. The Standards take the position that all convicted criminal defendants, including those who have pleaded guilty, should have the right to one appeal from a conviction.[4] Commentary to the Standards observes that in

---

[4] *See* Standard 21-1.1(a), 4 Standards at 21.5 ("The possibility of appellate review of trial court judgments should exist for every criminal

Anglo-American law "[t]here is today no dissent from the principle that every convicted defendant should be afforded the opportunity to obtain one judicial review of the conviction by a tribunal other than that in which the defendant was tried." Standard 21-1.1, cmt., 4 Standards at 21.6. That principle is recognized in international law as well. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14, ¶ 5, 999 U.N.T.S. 171 ("Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.").

Accordingly, the ABA submits this brief in support of the position that a criminal defendant who is required to seek leave to pursue a first appeal from his criminal conviction and who cannot afford appellate counsel should have the assistance of appointed counsel in seeking leave to appeal. Serious problems can arise in the administration of justice when indigent defendants are not assisted by counsel. Those problems are directly implicated in this case. Beyond the obvious harm that would result to indigents who would either have to proceed pro se in seeking leave to appeal or forgo such an opportunity if denied counsel, laws like the Michigan law at issue in this case could have a seriously detrimental effect on the indigent defense system as a whole. Ordinarily, the mere potential for an appeal with counsel acts as an effective check on the conduct of all actors in the criminal justice system at the trial level. Eliminating the appointment of appellate counsel for indigent defendants who plead guilty may therefore disadvantage indigent de-

---

conviction. It is undesirable to have any class of case in which such trial court determinations are unreviewable."); Standard 21-1.3(a) , 4 Standards at 21.10-21.11 ("A defendant should have the right to appeal from any final judgment of a trial court adverse to the defendant, including: (i) a conviction followed by a sentence of probation; (ii) a conviction followed by a sentence suspended as to imposition or execution: or (iii) a conviction based upon a plea of guilty or nolo contendere."); Standard 21-2.4, 4 Standards at 21.31 ("At the first level of appeal, procedures intended to eliminate frivolous cases from appellate court dockets without decisions on the merits are impractical and unsound.").

fendants at the trial stage as well as the appellate stage. Because the vast majority of convictions in Michigan and elsewhere result from guilty pleas (*see* Pet. Br. 30), these concerns are of pervasive importance to the administration of justice in this country, especially if other States follow Michigan's lead in denying appellate counsel.

SUMMARY OF ARGUMENT

Any criminal defendant who wishes to pursue a first appeal from his conviction or sentence should have the assistance of counsel in doing so if he so wishes. If the defendant cannot afford counsel, he should be appointed counsel on appeal. And an indigent defendant should have appointed counsel on appeal even if he pleaded guilty, and even if he must seek and obtain leave to appeal.

A. The assistance of counsel is indispensable to a defendant pursuing a first appeal from a conviction or sentence. Appeals are complex, specialized undertakings. They are no less forbidding to the layperson than a criminal trial. Appeals typically require compliance with procedures that are unfamiliar to nonlawyers: filing a notice of appeal, ordering transcripts, preparing and filing briefs. Court rules (including those governing Michigan's leave-to-appeal procedure) generally require defendants to identify the factual and legal bases for their appeal. Legal training and skill are needed to identify potentially meritorious claims of error in the record and to ensure that those points of error are properly preserved for appellate review. An unrepresented defendant who fails to discern a point of error, to describe the error properly, or to articulate the correct doctrinal basis for reversal is likely to lose forever any opportunity for reversal of his conviction or sentence.

In important respects, a defendant's first appeal from a criminal conviction (even when leave to appeal is required) is quite different from a discretionary second round of review in a state supreme court, where an indigent defendant does not have a constitutional right to appointed counsel. When a defendant pursues a discretionary second round of review,

similar to certiorari in this Court, he ordinarily will have the benefit of briefs that have been filed on his behalf in the intermediate appellate court. An unrepresented defendant appealing a conviction or sentence will typically not have the benefit of such materials, since many matters are resolved in trial courts without detailed briefing. Moreover, a state supreme court exercising discretionary review can usually determine from the face of the opinion of the lower court whether an issue warrants its review. The same is not true of a court reviewing a defendant's first appeal. Thus, without counsel, a defendant is likely to be adrift on appeal.

B. Michigan's decision to deny appointed appellate counsel to indigent defendants who have pleaded guilty lacks a sound basis. Although the State argues that the practice of denying appointed appellate counsel deters meritless appeals, in fact defendants who plead guilty may well have meritorious claims on appeal. For example, the defendant may have pleaded guilty to an offense without having had the nature of the charge accurately explained to him, or the defendant may not have had effective assistance of counsel in the guilty plea process. Without appointed appellate counsel, it is unlikely that such a defendant could obtain relief.

In addition, the Michigan practice inappropriately hobbles defendants who have pleaded guilty in appeals from their sentences. In Michigan, all defendants, whether they have pleaded guilty or were found guilty after trial, are subject to the same sentencing procedures under the State's sentencing guidelines system. There is no justification for deterring indigent defendants who have pleaded guilty, among all defendants, from appealing if the trial court has made an error in construing or applying the guidelines. Moreover, the Michigan guidelines are complex, and opportunities for error abound. A defendant cannot reasonably be expected to discern and pursue claims of sentencing error without the assistance of counsel.

C. The ABA recognizes that States have a legitimate interest in reducing and preventing appellate backlog, but

the approach chosen by Michigan is neither necessary nor appropriate to that task. The state courts can provide for disposition of particular cases or classes of cases on separate tracks and can use court staff to identify cases to be so treated. The assistance of counsel, however, is not a luxury that can be dispensed with on appeal any more than at trial. It is, rather, an essential part of a fair system of justice.

ARGUMENT

ANY INDIGENT CRIMINAL DEFENDANT WHO SEEKS TO PURSUE A FIRST APPEAL SHOULD HAVE APPOINTED COUNSEL, EVEN IF THAT DEFENDANT HAS PLEADED GUILTY AND MUST OBTAIN LEAVE TO APPEAL

A. Without The Assistance Of Counsel, An Indigent Defendant Who Wishes To Pursue A First Appeal Will Be Seriously Disadvantaged

1. This Court has long recognized the critical need that indigent defendants have for the assistance of counsel in defending themselves against prosecution by the State. In cases applying the Sixth Amendment, which guarantees a defendant the assistance of counsel at trial, this Court has explained that "[t]he right [of a defendant] to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him." *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932); *see also Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."). The Court's decisions under the Sixth Amendment reflect "the recognition and awareness that an unaided layman ha[s] little skill in arguing the law or in coping with an intricate procedural system." *United States* v. *Ash*, 413 U.S. 300, 307 (1973).

The same concerns have led this Court to identify a similar right under the Due Process and Equal Protection Clauses to the assistance of counsel on a first appeal. As the Court has observed, "[t]o prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake." *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985). Recognizing that nonlawyers generally lack the legal skills and training needed to discern the legally and factually promising bases for appeal, the Court has emphasized that "lawyers are 'necessities, not luxuries' in our adversarial system of justice . . . . The defendant's liberty depends on his ability to present his case in the face of 'the intricacies of the law and the advocacy of the public prosecutor.'" *Id.* at 394 (quoting *Gideon*, 372 U.S. at 344, and *Ash*, 413 U.S. at 309).

An unrepresented defendant faces challenges on appeal that are equally as daunting as those at a trial. For example, anyone pursuing an appeal typically must file a notice of appeal in the proper form and in the proper court, designate the record for appeal, order transcripts, and specify the points to be raised on appeal. In addition, in Michigan, a defendant who must apply for leave to appeal must state the factual and legal basis for any claim of error to be raised on appeal, which presumably requires specific references to the record if such claims are to appear meritorious to the reviewing court. *See* Pet. App. 169a-170a. All of this must be done, moreover, within strict deadlines and while the defendant is incarcerated (unless the defendant has obtained bail pending appeal). Moreover, in many cases, the application for leave to appeal may have to be filed before the complete record on appeal will have been prepared. Thus, an indigent defendant cannot assume that the record by itself will be sufficient to allow an appellate court to discern the presence of error. *See* MCR 7.205 (directing that application for leave to appeal be filed within 21 days after judgment, but noting circumstances in which transcript may not yet be available).

Lacking the advice and assistance of counsel, an indigent defendant would be seriously disadvantaged in preparing an application for leave to appeal.[5] For example, a defendant who wished to challenge his guilty plea on the ground that his trial counsel or the trial court had erred in explaining the nature of the charge against him would surely need the assistance of appellate counsel to explain the deficiency, especially if the error involved misconstruction of the elements of the offense. *Cf. Bousley* v. *United States*, 523 U.S. 614, 618 (1998) (guilty plea may be involuntary if court and counsel err in explaining elements of the offense to the defendant). Similarly, a defendant would need the assistance of appellate counsel to understand how to raise a claim of ineffective assistance of trial-level counsel, which under Michigan law must be raised on direct appeal, absent good cause.[6] And if an unrepresented defendant failed to perceive how to challenge a mistake by the trial court in construing and applying the highly technical Michigan sentencing guidelines in his case (*see infra* pp. 18-20), he could well lose

---

[5] Indigent defendants also need the advice of counsel in deciding *whether* to appeal. In many cases, it may not be in the defendant's best interest to appeal, but a defendant may not recognize that point without the advice of an attorney. If a defendant succeeds in having his plea or sentence overturned on appeal, he may be subject to a longer sentence after retrial, replea, or resentencing. *See Alabama* v. *Smith*, 490 U.S. 794 (1989). The defendant may not recognize this risk and may not understand that additional, potentially detrimental factors bearing on his sentence may be taken into account on resentencing (such as additional convictions that became final, his record in prison, or errors that were overlooked by the original sentencing court).

[6] *See, e.g., People* v. *Reed*, 499 N.W.2d 441, 444-446 (Mich. Ct. App. 1993). If a defendant fails to recognize and raise a meritorious challenge on appeal—an ineffective-assistance claim or any other challenge—the defendant waives the issue for that appeal and, if good cause or prejudice is lacking, for subsequent postconviction relief too. *See, e.g., People* v. *Miller*, 604 N.W.2d 781, 783 (Mich. Ct. App. 1999) (court will decline review of issue on direct appeal when the issue was not raised in questions presented); MCR 6.508(D)(3) (court may not grant postconviction relief for grounds that could have been raised on appeal, absent good cause and prejudice).

any opportunity to obtain reversal of an erroneous sentence. For similar reasons, this Court has recognized that "the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Evitts*, 469 U.S. at 393.

An unrepresented defendant's failure to identify the proper doctrinal basis for a federal challenge to his conviction on direct appeal would also foreclose the defendant's ability to pursue that federal claim further, either in this Court on direct review or on federal habeas corpus review.[7] Consider, as an example, a defendant who entered a guilty plea without having been explained the nature of the charge against him, or without having understood the constitutionall rights he was waiving by pleading guilty.[8] That defendant might believe that he had a basis for some kind of challenge to the validity of his guilty plea, but not recognize that his claim implicated the federal Constitution. But to preserve the federal claim, it would be insufficient for the defendant

[7] Michigan requires that a defendant seeking leave to appeal complete a form stating the factual and legal basis for any claim of error. This supposedly "nontechnical and easily understood" (Pet. Br. 37) form informs defendants that they must "[s]tate the issues that you want the Court of Appeals to review, such as how you believe the circuit court erred in accepting your plea or imposing the sentence," and that they must "state the law that supports your position and explain how the law applies to the facts of your case." Pet. App. 169a, 170a. The form, however, does not counsel defendants that they must specify whether their claims arise under state or federal law, or both. An unrepresented defendant might believe that his guilty plea or sentence was invalid, but might not know that his claim implicated both state and federal law. Even if he did have such unexpected legal acuity, the defendant might not understand that he should specify whether his claim arose under state or federal law, or both. In this regard, the form's "nontechnical" nature is a vice rather than a virtue: it does not sufficiently warn defendants that they must carefully identify the precise doctrinal bases for their claims, lest they lose forever the right to pursue those claims.

[8] *See, e.g., Bousley* v. *United States*, 523 U.S. 614, 618 (1998) (holding that guilty plea is not voluntary if defendant does not recognize true nature of charges against him); *Henderson* v. *Morgan*, 426 U.S. 637, 647 (1976) (same).

simply to state that his plea was not knowing or voluntary. The defendant would also have to invoke the correct specific provision of the federal Constitution and, indeed, would have to invoke the correct federal doctrine to preserve his challenge.[9]

It is unrealistic to expect an indigent unrepresented defendant to navigate these shoals with sufficient skill to make and to preserve potentially meritorious challenges to his conviction or sentence.[10] The wrong guess about the basis for the defendant's challenge could be catastrophic, for it could bar the defendant from pursuing the most promising avenue for his claim. *Compare Holland* v. *Illinois*, 493 U.S. 474, 478, 487 & n.3 (1990) (rejecting white defendant's claim that use of peremptory challenges to strike black jurors violates "fair cross-section" requirement of Sixth Amendment, and declining to reach equal protection claim, which was deemed waived), *with Powers* v. *Ohio*, 499 U.S. 400 (1991) (sustaining similar claim under Equal Protection Clause).

To be sure, the Michigan courts *might* perceive merit in an unrepresented defendant's application for leave to appeal and appoint counsel for plenary briefing. But the far more

[9] *See Baldwin* v. *Reese*, 124 S. Ct. 1347, 1350-1351 (2004) (mere reference to "ineffective assistance" of "appellate court counsel" in state court filing was insufficient to preserve federal ineffective-assistance claim); *Gray* v. *Netherland*, 518 U.S. 152, 163 (1996) ("We have also indicated that it is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the substance of such a claim to a state court." (internal quotation marks omitted)); *Anderson* v. *Harless*, 459 U.S. 4, 6 (1982) ("It is not enough that all the facts necessary to support the federal claim were before the state courts, . . . or that a somewhat similar state-law claim was made . . . ." (citations and internal quotation marks omitted)).

[10] For example, a nonlawyer would likely fail to grasp the distinction between arguing that his guilty plea violated the Due Process Clause of the Fourteenth Amendment because he did not receive adequate notice of the charges against him (*see Henderson* v. *Morgan*, 426 U.S. at 644-646 & n.13) and arguing that his plea violated the Due Process Clause because he did not validly waive his constitutional trial rights (*see Boykin* v. *Alabama*, 395 U.S. 238, 242-243 (1969)).

likely eventuality is that the unrepresented defendant will fail to make his claim with sufficient clarity and precision, the Michigan courts will overlook claims with potential merit, and those claims will be lost forever. "The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas* v. *California*, 372 U.S. 353, 358 (1963).

2. *Ross* v. *Moffitt*, 417 U.S. 600 (1974), on which the State and its *amici* rely heavily, is inapposite. In that case, this Court ruled that the Fourteenth Amendment did not require that defendants who had already pursued an appeal of their convictions to an intermediate state court of appeals, in which they had had the assistance of appointed counsel, also be appointed counsel to pursue a petition for further discretionary review either in the state supreme court or in this Court. *See id.* at 610-619.

Petitions for discretionary review to a state supreme court in a three-tier court system (as in Michigan) present entirely different considerations from those raised by first appeals, including first appeals where the defendant must seek leave to appeal. As this Court stressed in *Ross*, a defendant who is seeking a discretionary second or third round of appellate review of his conviction "will have, at the very least, . . . a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case." 417 U.S. at 615. Thus, to apprise a state supreme court (such as the Michigan Supreme Court) of the substance of his claims, the defendant could simply reproduce the brief that was filed on his behalf on the first appeal. Indeed, given that the customary practice in state supreme courts, as in this Court, is not to entertain claims of error that were not specifically raised in or decided by the court from which review is sought, a defendant generally could not go beyond what was filed on his behalf in

the intermediate court of appeals or decided by that court on the face of its opinion.[11]

By contrast, when a defendant must seek leave to pursue a first appeal, there often will be no such clean record from the trial court for the appellate court to review. Briefs may well not have been filed in the trial court on the pertinent issues. The State notes (Pet. Br. 36) that, "[u]nless made in open court during a hearing or trial, a motion filed in Michigan courts must be in writing." But as experienced criminal practitioners well know, in the fast-moving pace of criminal trial practice, critical motions often are made in open court rather than in writing. Even when written motions are filed in trial courts, they are often cursory. At a minimum, trial court motions are typically much less developed than appellate briefs, which lawyers ordinarily have several weeks to prepare. In addition, trial courts often make oral findings or observations that go beyond the points directly addressed by parties in their written motions. That is particularly true of sentencing, where the trial court may make findings on issues that were not specifically addressed in the parties' sentencing memoranda, if indeed any were filed.

Thus, unlike an unrepresented defendant who has already had one appeal and who is seeking further review, an unrepresented defendant pursuing a first appeal generally will not have the option of simply relying on what was previously filed by a lawyer on his behalf. A defendant pursuing a first appeal needs the assistance of a lawyer to organize the record, to identify the crucial points in the transcript or written record where the claimed error was committed, and to explain which legal doctrines are implicated by the assignments of error. "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for

---

[11] *See Illinois* v. *Gates*, 462 U.S. 213, 217-224 (1983); *Booth Newspapers* v. *University of Mich. Bd. of Regents*, 507 N.W.2d 422, 432 & n.23 (Mich. 1993).

review." *Jones* v. *Barnes*, 463 U.S. 745, 752 (1983); *see Douglas*, 372 U.S. at 358 (stressing that an appealing defendant needs "the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf").

3. The purposes served by first appeals are also quite different from those served by discretionary review proceedings at a higher level. The central purpose of first appeals is correction of error in individual cases. Although appeals also often serve the useful function of clarifying legal principles, that is not an essential component of appeals, and most appellate courts are familiar with appeals that raise issues of little interest to anyone other than the parties to the case. That is true, moreover, whether or not the first appeal is of right. Even in Michigan's system under which leave to appeal is required for defendants who have pleaded guilty, the defendant need not show, and the court need not conclude, that the issue on appeal is of broad legal significance for leave to be granted.

By contrast, the central purpose of discretionary review in the Michigan Supreme Court, as with review in this Court, is to clarify important legal principles of significant public interest. *See* MCR 7.302(B) (setting forth grounds for leave to appeal to Michigan Supreme Court); *cf.* Sup. Ct. R. 10; *Ross*, 417 U.S. at 615 (discussing similar practice of North Carolina Supreme Court). Especially when lower courts have reached differing conclusions, a state supreme court (and this Court) may grant discretionary review even when the court believes that the lower court's decision is correct. *See id.* at 616-617 ("This Court's review . . . depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). In many cases, a state supreme court exercising this discretionary, law-clarifying function can determine from the face of the lower court's opinion (or from a dissent) whether the legal issues warrant plenary consideration. Thus, this Court observed in *Ross* that, while an attorney would certainly be "helpful" to the defendant in sharpening the issues for discretionary review in a state supreme court (*id.* at 616), counsel's function is not so indispensable as it is on a first appeal, where an unrepresented defendant is likely to be adrift.

B. There Is No Basis For Denying Assistance Of Counsel To Indigent Defendants Seeking Leave To Appeal Convictions Based On Guilty Pleas

1. The State argues that defendants who plead guilty are unlikely to have even potentially meritorious claims for appeal, and so nothing of significance is lost by deterring indigent defendants from appealing by denying them appointed counsel when they seek leave to appeal. The State notes that a guilty plea operates as a waiver of many possible claims of error, including many constitutional claims. *See Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973); *McMann* v. *Richardson*, 397 U.S. 759, 770 (1970).

Nonetheless, a defendant who pleads guilty generally can challenge his conviction and sentence on appeal in at least two important circumstances. First, a defendant may claim that the conviction resulted from a defect in the plea process itself—either because the guilty plea was not knowing or voluntary, or because the trial court failed to follow the required procedures for taking a guilty plea. *See In re Guilty Plea Cases*, 235 N.W.2d 132 (Mich. 1975) (outlining circumstances in which failure to adhere to plea procedures requires reversal); *People* v. *Rostick*, No. 241916, 2004 WL 67551 (Mich. Ct. App. Jan. 15, 2004) (per curiam) (reversing conviction based on nolo contendere plea for failure to establish lack of factual basis, after initially denying leave to appeal). Second, in Michigan's sentencing system, which resembles the federal sentencing guidelines system in many respects, a defendant convicted on guilty plea may appeal an error in sentencing, which occurs after the guilty plea is accepted. *See People* v. *Hedgwood*, 636 N.W.2d 127 (Mich. 2001) (per curiam); *People* v. *Miller*, No. 240613, 2003 WL 22442992, at *1-*2 (Mich. Ct. App. Oct. 28, 2003) (per curiam) (finding scoring error and remanding for resentencing in case where defendant pled guilty).

By allowing defendants to press appeals in such circumstances (although they must seek leave to appeal), Michigan law recognizes that defendants who plead guilty may well have meritorious claims of error. Defendants who have pleaded guilty and who can afford retained counsel on appeal will have the assistance of counsel in preparing their applications for leave to appeal. Yet the State denies *indigent* defendants the right to the assistance of counsel in seeking leave to appeal on such grounds. For example, an indigent defendant seeking leave to appeal because his guilty plea was involuntary would not fall within any of the categories of persons for whom counsel may be appointed, even in the court's discretion, for assistance in preparing an application for leave to appeal. And an indigent defendant who has pleaded guilty and seeks leave to appeal a sentencing scoring error placing his sentence above the properly applicable guidelines range would also have no right to counsel, but could only have one appointed in the court's discretion. *See* Mich. Comp. Laws § 770.3a(3).[12] Thus, the indigent defendant, unaided by counsel, would have to prove to the court of appeals that his case was sufficiently meritorious to warrant a plenary appeal and the appointment of counsel.

[12] The court is barred from appointing appellate counsel for a defendant seeking leave to appeal his sentence if the defendant did not properly preserve his sentencing issue for appeal. *See* Mich. Comp. Laws § 770.3a(3). Of course, the question whether a claim of error was properly preserved is itself often not simple. *See, e.g., People* v. *Conway*, No. 246026, 2004 WL 787179, at *2 (Mich. Ct. App. Apr. 13, 2004) (per curiam) (assuming error was preserved in complicated circumstances); *cf. Anderson*, 459 U.S. at 8 (Stevens, J., dissenting) ("Few issues consume as much of the scarce time of federal judges as the question whether a state prisoner adequately exhausted his state remedies before filing a petition for a federal writ of habeas corpus."). A lawyer, familiar with court transcripts, is far more likely to be able to persuade a court that a claim of error was properly preserved than an unrepresented defendant, who may not even have the pertinent transcripts when preparing his application for leave to appeal (*see supra* pp. 8-9).

Moreover, even when a claim has not been preserved in the trial court, Michigan law recognizes that a defendant can obtain appellate relief in two circumstances. First, the defendant can obtain plain-error review. *See People* v. *Kimble*, 651 N.W.2d 798, 802-804 (Mich. Ct. App. 2002), *leave to appeal granted*, 659 N.W.2d 231 (Mich. 2003) (oral argument held Jan. 13, 2004); *People* v. *Scott*, No. 243418, 2004 WL 405919, at *2 (Mich. Ct. App. Mar. 4, 2004) (per curiam) (applying *Kimble* and reviewing for plain error); *People* v. *Duty*, No. 241759, 2003 WL 22871279, at *3-*6 (Mich. Ct. App. Dec. 4, 2003) (per curiam) (same, and remanding for resentencing). Second, the Michigan Court of Appeals has also been willing to review sentencing errors that a defendant failed to properly preserve when the defendant presents the issue in the form of an ineffective-assistance-of-counsel claim. *See, e.g., People* v. *Wilson*, 652 N.W.2d 488, 490 (Mich. Ct. App. 2002) (per curiam) (holding that consideration of the sentencing error was barred by MCR 6.429(C), but nevertheless reviewing an ineffective-assistance-of-counsel claim regarding the same sentencing error); *People* v. *Dupuis*, Nos. 239315, 239316, 2003 WL 22956389, at *3 (Mich. Ct. App. Dec. 16, 2003) (per curiam) (same, and finding ineffective assistance and remanding for resentencing); *Miller*, 2003 WL 22442992, at *1-*2 (same). Without the assistance of counsel, however, a defendant would be seriously disadvantaged in presenting such claims in a persuasive manner. Yet these are the cases where the indigent defendant may need appellate counsel the most—to review the sentencing record and present any previously unpreserved sentencing errors for the first time on appeal.

2. Michigan's determination that indigent defendants who have pleaded guilty should not have the right to assistance of counsel when seeking leave to appeal raises serious concerns about the fair administration of justice. It is particularly troubling that Michigan prohibits appointment of counsel when an indigent defendant seeks leave to persuade an appellate court that his guilty plea was constitutionally defective because it was involuntary or not made with the necessary understanding. An indigent defendant could forever lose the right to relief from even an involuntary guilty plea if he were deterred from seeking leave to appeal because he lacked the right to assistance of counsel, or if he did seek leave to appeal but failed to perceive and preserve the proper doctrinal basis for his appeal.[13]

[13] This Court has held that a defendant who does not properly raise a constitutional challenge to the validity of his guilty plea on direct appeal generally loses the right to raise such a challenge on collateral habeas corpus review (subject only to a very narrow exception if the defendant can

Similarly, a defendant who failed to appeal based on nonconstitutional errors in the guilty plea process—such as the trial judge's failure to establish on the record that there was a proper factual basis for the plea—would forever lose the right to relief from his invalid plea. Michigan follows the rule of *United States* v. *Timmreck*, 441 U.S. 780 (1979), that a nonconstitutional error in the taking of a guilty plea, even if it might provide a basis for reversal on direct appeal, is not cognizable on collateral review (at least absent a showing of a fundamental miscarriage of justice). *See People* v. *Ward*, 594 N.W.2d 47, 51-52 (Mich. 1999) (per curiam); *People* v. *Ingram*, 484 N.W.2d 241, 243 (Mich. 1992). But that is exactly the kind of error that a defendant is likely not to perceive without help from his trial counsel or the trial judge—both of whom are likely to have overlooked the error themselves (or else the error would have been rectified).

Nor is there a sound basis for Michigan's broad restrictions on appointment of counsel when a defendant who has pleaded guilty seeks to appeal an erroneous sentence. The Michigan courts follow a mandatory sentencing guidelines system, similar to that in the federal courts, of which appeals from sentences are a routine and important part. The Michigan guidelines system applies both to defendants who plead guilty and those who are convicted after full trials. There is no particular reason to believe that courts will make fewer sentencing errors in guilty plea cases as a class than in trial cases, and there is certainly no reason to believe that trial courts will make fewer sentencing errors in cases of *indigent* defendants pleading guilty than in cases of nonindigent defendants pleading guilty. Thus, there does not appear to be any justification for deterring indigent defendants who have pleaded guilty—out of the entire class of defendants who are convicted—from appealing from their sentences.[14]

show cause and prejudice for his failure to raise the claim on appeal). *See Bousley*, 523 U.S. at 621-622.

Moreover, the sentencing guidelines system in Michigan is complex—indeed, no less complex than the federal system. Under the Michigan system, a defendant's sentence is determined in the following manner. First, based on the particular offense, the court must "score" the statutorily specified "offense variables" and arrive at an "offense variable level" (which is analogous to the offense level under the federal sentencing guidelines). *See* Mich. Comp. Laws §§ 777.21(1)(a), 777.31. Second, the court must score all of the statutorily specified "prior record variables" to arrive at the defendant's "prior record variable level" (analogous to the criminal history category under the federal sentencing guidelines). *See id.* §§ 777.21(1)(b), 777.51. The court then must consult a sentencing grid applicable to the specific offense class and determine the "minimum sentence range"—but in contrast to the federal system, the Michigan guidelines have numerous sentencing grids, each corresponding to one of nine different offense classes. *See id.* §§ 777.21(1)(c), 777.61-777.69. Finally, the court must impose a sentence within the applicable guidelines range. *See id.* § 769.34(2).[15]

[14] Although a defendant's guilty plea does waive numerous claims of error based on incidents antecedent to the defendant's plea, it does not follow (and this Court has never held) that a guilty plea necessarily waives *any* claim of error arising out of sentencing. Thus, whatever might be said about the effect of a guilty plea in waiving claims of error concerning the defendant's guilt, there is no basis to conclude that such a plea has any significance for a defendant's right to appeal his sentence.

[15] As the Michigan Supreme Court explained in *People* v. *Babcock*, 666 N.W.2d 231, 240-241 (2003):

> Under the guidelines, offense and prior record variables are scored to determine the appropriate sentence range. Offense variables take into account the severity of the criminal offense, while prior record variables take into account the offender's criminal history. Therefore, the appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant's criminal history.

The opportunities for legal and factual error by trial courts in implementation of the Michigan sentencing guidelines are numerous, as the federal courts have discovered in their own, similar system. Even in cases involving guilty pleas, the Michigan trial courts do sometimes misapply the guidelines, requiring the Michigan Court of Appeals to remand cases for resentencing. *See, e.g., People* v. *Cook*, No. 245018, 2004 WL 576251, at *1 (Mich. Ct. App. Mar. 23, 2004) (mem.) (remanding when trial court erroneously sentenced defendant to prison time rather than probation); *Miller*, 2003 WL 22442992, at *1-*2 (remanding because trial counsel rendered ineffective assistance in failing to object to scoring error affecting defendant's sentence). But if the Michigan sentencing guidelines occasionally confound even trial courts, they are hardly likely to be pellucid to indigent, unrepresented defendants. In short, legal skill is necessary to effective comprehension of the system and indispensable to pursuing a successful appeal from a sentencing error. Thus, a defendant who has pleaded guilty and who wishes to appeal his sentence is likely to be seriously disadvantaged if he lacks counsel to prepare his application for leave to appeal.

3. Finally, no state interest suffices to justify a situation, which Michigan has put in place, whereby nonindigent defendants who have pleaded guilty may seek leave to appeal with the assistance of counsel, but indigent defendants may not. There is no basis for believing that indigent defendants as a rule are less likely to have meritorious issues on appeal than nonindigent defendants. For example, there is no reason to believe that indigent defendants are less likely than nonindigent defendants to plead guilty involuntarily or unknowingly, or that trial courts are less likely to commit errors in sentencing indigent defendants than nonindigents. But whereas a defendant who can afford counsel will have expert assistance in (for example) explicating the particular aspect of the sentencing guidelines at issue in the appeal, the indigent defendant will have no such help. "[O]nly the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is

forced to go without a champion on appeal." *Douglas*, 372 U.S. at 356.

As a practical matter, therefore, a defendant who can afford counsel will stand a much better chance of persuading the Michigan courts that his claims of error have sufficient merit that leave to appeal should be granted. Once granted leave to appeal, the defendant with means will then proceed to a plenary appeal, assisted by counsel, whereas the indigent defendant, denied leave to proceed further, will have no appeal. As in *Douglas*, therefore, "the discrimination is not between 'possibly good and obviously bad cases,' but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot." 372 U.S. at 357. Such discrimination is contrary to basic principles of equality and fairness in the Fourteenth Amendment.

C. Michigan's Interests In Discouraging Meritless Appeals And Reducing Appellate Backlog Are Insufficient To Sustain The Challenged Statute

The State argues (Pet. Br. 3) that its practice of requiring defendants who have pleaded guilty to seek leave to appeal is justified by its interests in discouraging meritless appeals and reducing the backlog in its courts of appeals. The issue before the Court in this case, however, is not whether the State may require any particular class of appealing defendants to seek leave to appeal. As a matter of policy, the ABA opposes the leave-to-appeal device as a method of deterring frivolous appeals and reducing appellate caseload (*see supra* pp. 3-4 & n.4), but the propriety of that procedure is not at issue here. Rather, the question is whether indigent defendants are entitled to the assistance of counsel in passing that threshold barrier to their ability to pursue any appeal at all.

If the leave-to-appeal procedure operates as intended, a court that reviews applications for leave to appeal would be assisted, not harmed, by counsel's skill in identifying the issues that would have potential merit on appeal. If a defendant is represented by appointed counsel on an application

for leave to appeal, that counsel will be constrained by ethical and professional norms as well as court rules from seeking leave to pursue meritless issues. *See* ABA Model Rule Prof'l Conduct 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); MCR 7.216(C)(1)(a) (authorizing sanctions when "the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal"). Even among nonfrivolous arguments, competent appointed counsel is likely to pursue only the most promising claims on appeal (*see Jones* v. *Barnes*, 463 U.S. at 752-753)—unlike unrepresented appellants, who are unlikely to have the legal skill to sift promising from unpromising arguments. Appointment of counsel therefore *advances* the State's interest in discouraging meritless appeals.[16]

The ABA recognizes that backlog is a serious problem in many state appellate court systems. State courts have tools to address that problem without sacrificing fundamental requirements of a fair system of justice—including the requirement that a criminal defendant have the assistance of counsel on appeal. For example, the Criminal Justice Standards encourage appellate courts "to select, among diverse procedural paths for hearing and submission of cases to the appellate court and for disposition of cases by the court, the path that is most appropriate for each case," Standard 21-3.1(b)(iii), 4 Standards at 21.37, and also recommend that appellate courts use court staff in "evaluating new appeals and recommending to the court the procedural path appropriate

[16] The State may also adopt appropriate procedures that allow appellate counsel to withdraw when counsel perceives no meritorious claims on appeal, while safeguarding the appealing defendant's right to counsel. *See Smith* v. *Robbins*, 528 U.S. 259, 264-265 (2000); *Anders* v. *California*, 386 U.S. 738, 744 (1967).

to each," Standard 21-3.4(c)(1), 4 Standards at 21.47-21.48. Many States also authorize appellate courts to identify cases that are appropriate for decision without oral argument or for summary disposition. If instituted properly, such procedures can ensure that every appealing defendant has the opportunity to make his best claim for reversal and the right to have that claim reviewed. What is not consistent with a fair system of justice, however, is for the State to deny an indigent criminal defendant to undertake the burden of appeal without the help of counsel.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

DENNIS W. ARCHER
Counsel of Record
SETH P. WAXMAN
PAUL R.Q. WOLFSON
NOAH A. LEVINE
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60610
(312) 988-5000

JUNE 2004